94-123

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petitions	)	MMB File No. 900418A
and Related Pleadings Regarding	)	MMB File No. 870622A
The Prime Time Access Rule,	)	MMB File No. 920117A
§ 73.658(k).	)	

COMMENTS OF KING WORLD PRODUCTIONS, INC.

King World Productions, Inc. ("King World") submits these comments in response to the Public Notice issued by the Commission on April 12, 1994 with respect to the above-captioned requests that the Commission repeal, or modify, the Prime Time Access Rule ("PTAR").

Summary of Position

As a leading producer/distributor of first-run syndicated programming, King World has a vital stake in the maintenance of an open and competitive programming marketplace and reasonable access to audiences through network-owned and -affiliated stations.[1/] We are convinced that neither public interest nor constitutional considerations warrant any reexamination of PTAR: the rule has advanced and continues to promote both source and outlet diversity; to the extent that PTAR burdens speech at all, it is in furtherance of legitimate governmental interests -- the promotion and maintenance of a diversified and

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1/ King World's programs include "Inside Edition", "Jeopardy!", "The Oprah Winfrey Show" and "Wheel of Fortune", programs which are familiar to millions of Americans and among the top-ranked shows in first-run syndication.

vibrant over-the-air broadcast marketplace -- and narrowly tailored to achieve that objective. Nonetheless, the Commission's response to the Petition for Mandamus filed by First Media L.P.[2/] evidences an a priori inclination to probe more deeply the efficacy of and rationale for PTAR. In light of that inclination, King World strenuously maintains that, if any further proceeding is to be initiated, it should take the form of a Notice of Inquiry.

We show in these comments that the very real contribution PTAR has made to program diversity and choice over the past two decades suggests that the Commission proceed with any reexamination of this rule only with the utmost of caution. We also show that the parties seeking repeal or modification of the rule have greatly oversimplified the changes in the video marketplace as they relate to the continuing need for PTAR and that, therefore, the outcome advocated by such parties is far from pre-ordained, if not utterly baseless. Lastly, we show that the constitutional arguments (advanced principally by First Media) are devoid of merit, and should be dismissed.

The pendency of a Notice of Inquiry would itself have some unsettling effect upon the industries affected by PTAR and, therefore, on the growth of first-run syndication and locally produced programming. That effect would, however, be far more severe, and perhaps crippling, if the Commission were to

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2/ See Answer of Federal Communications Commission to a Petition for Writ of Mandamus, In Re First Media L.P., No. 94-1080 (filed March 23, 1994).

proceed by a Notice of Proposed Rulemaking, which would implicitly carry with it a finding the Commission cannot make -- namely, that PTAR in its current form has outlived its usefulness. A deliberate assessment of the relevant considerations will, we are convinced, lead the Commission to conclude that PTAR should be preserved intact. Caution is therefore warranted.

The Commission Should Proceed with Caution In Any Reexamination of PTAR Because the Rule Works.

Any discussion of potential repeal of, or modification to, PTAR must start from the unassailable premise that the purpose of the rule has been, and continues to be, realized. In the past two decades, the number of first-run syndicated series aired in the United States has increased dramatically. The quality and diversity of program choice made available to the American public by first-run syndicators like King World is comparable to that of the networks. Assured of at least some access to the prime time daypart on network-affiliated stations in the top 50 markets, King World, and its competitors, have invested and continue to invest in new and innovative programming. Above all, viewer response to first-run syndicated programming demonstrates that PTAR has achieved its fundamental goal of making available -- through free, over-the-air television -- programming responsive to the diverse needs and interests of the American public.

Of the petitions under consideration, only two address the public interest values underlying PTAR. Both Hubbard

Broadcasting, Inc. ("Hubbard") and Channel 41, Inc. contend that there now exists "truly independent sources of prime-time programming", either first-run syndicated or locally produced. Amendment of Part 73 of the Commission's Rules, 23 FCC 2d 382 at 394 (1971). Unlike earlier assaults upon PTAR, in which some of the same parties argued that the rule should be repealed because it had allegedly failed to promote diversity,[3/] the argument advanced now is that, because the purpose of the rule has been definitively achieved, it is no longer needed. Petition for Rulemaking of Hubbard Broadcasting, Inc., at 13 ("There is an increased supply of first-run non-network syndicated programming.") ("Hubbard Petition"); see also, Comments of CBS in MM Docket No. 91-221 at 56 (filed November 21, 1991) ("CBS Comments"). This turns rational policy making upside down: the fact that the goals the Commission set out to achieve in 1971 have been realized to date compels the conclusion that the rule should be found to continue to be in the public interest or that, at least, the Commission proceed very cautiously in any reexamination of it.

Hubbard and Channel 41, Inc. in fact maintain that the emergence of a viable first-run syndication industry has had nothing to do with the existence of the rule. See Hubbard Petition at 18-19; Channel 41, Inc., Petition for Rulemaking at 11-18. ("Channel 41, Inc. Petition") But, the petitioners

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3/ See NAITPD v. FCC, 516 F.2d 526, 534 (D.C. Cir. 1975); Prime Time Access Rule, 50 FCC 2d 829, 837 (1975).

offer no evidence to show that the first-run syndication programming market during prime time hours would be sustainable absent the limited access to the top 50 markets that the rule provides. Assurance that there is an opportunity for access on the key stations in the key markets surely cannot be found to be wholly irrelevant to the decisions made by King World and other investors in first-run programming. Indeed, petitioners seem less than convinced by the force of their own argument: if the emergence of a vibrant first-run syndication industry were truly unrelated to PTAR, logic dictates that Hubbard and Channel 41, Inc. should contend for its outright repeal; yet, these two petitioners (as well as CBS in its earlier comments) insist that they seek "only" a modification of the rule to permit off-network programming to be run during the access window.4/

In any case, the petitioners do not and cannot dispute these elemental facts: prior to the promulgation of PTAR there was, literally, no alternative to network-controlled programming available over-the-air on network affiliates in the top 50 markets; there is now. This, itself, suggests that the

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4/ We show in the next section of those comments that such a modification would be tantamount to repeal. It is also noteworthy that at least one interested party who would benefit from either modification or repeal of the rule does not share the views of the petitioners or CBS as to the causal relationship between PTAR and diversity. See Comments of Cap Cities/ABC in MM Docket No. 90-162 at p. 42-45 (filed November 21, 1990) "[q]uite arguably, it is more important than ever to preserve the opportunity for first-run syndication in the top markets..."; see also Comments of Cap Cities/ABC in MM Docket No. 91-221 at 32.

Commission proceed, if at all, with the utmost caution in any reexamination of PTAR.

This conclusion is further buttressed by certain facts with respect to the first-run syndication industry that the petitioners choose to ignore. First, despite the growth in syndication revenue that has occurred over the past 20 years, total first-run syndicated revenues are less than 15% of total advertising expenditures on the 3 major over-the-air television networks. See Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd. 3996 at 4010 (1991) ("OPP Paper"). Second, the characterization of the first-run syndication industry as successful, although accurate, masks the very narrow base upon which this success rests. For example, of 38 new series proposed for launch in the 1990-91 season, only 12 were successfully cleared and only 2 made it into their second year; in 1991-92, the number of proposed new shows dropped to 16, of which only 7 were launched and only 2 made it into the second year; in 1992-93 only 15 shows were proposed for launch, of which only 10 were launched and only 3 made it into their second year in syndication . The success attributable to PTAR is both modest and fragile.

The production and distribution of first-run syndicated programs remains -- as it has been from the inception of the rule -- an extremely risky venture with many more failures than successes. As the Commission correctly observed in the course of its most recent reexamination of this much scrutinized rule, the "very uncertainty of the future" of PTAR inhibits investment in the production and distribution of programming designed for broadcast during the access window. Prime Time Access Rule, 50 FCC 2d at 837. The initiation of even a Notice of Inquiry in response to the Hubbard and Channel 41, Inc. petitions would be likely to further dampen the investment in new and innovative programming designed for broadcast during prime time access. Thus the very real, albeit fragile, contribution that PTAR has made to program diversity and choice compels the conclusion that, if further proceedings are unavoidable, the Commission should indulge in no assumptions or tentative conclusions; those proceedings should take the form of a Notice of Inquiry.

The Commission Should Proceed with Caution in any Reexamination of PTAR because there is No Creditable Evidence that Changes in the Video Marketplace Have Vitiated the Need for the Rule in its Present Form.

Hubbard and Channel 41, Inc. also maintain that PTAR is irrelevant because of changes which have occurred in the structure and economics of the video marketplace over the past several decades. Petitioners concede, as they must, that the purpose of the rule is to assure that the producers and distributors of independent, non-network programming have access to the "crucial primetime evening" hours. Amendment of Part 73 of the Commission's Rules, 23 FCC 2d 382, 394 (1971). Drawing largely -- but selectively -- on the OPP Paper, the petitioners contend that it is no longer necessary to provide regulatory assurance of access to primetime hours because the technological advances that have occurred since the rule was adopted make such assurance unnecessary. See Hubbard Petition at 16-18; Channel 41, Inc., Petition at 11-18. Despite its superficial plausibility, this argument founders, as more fully set forth below, first, because it presumes that first-run and off-network programming have identical market and audience demand characteristics, and, second, because it assumes that the various video distribution systems operating in the current marketplace are as well suited to the launch of new first-run syndicated programming as network-owned and network-affiliated television stations in the top 50 markets. These assumptions are contradicted by data compiled in the OPP Paper, as well as the hands-on experience of independent producers/syndicators such as King World.

First. There is a fundamental difference between the audience demand characteristics of off-network programming and those of first-run syndicated programming. Off-network programming newly introduced to syndication carries with it a built-in audience demand. First-run programming, by contrast, must wholly create audience acceptance from the ground up, on a market-by-market basis. Access to audience at sufficient levels[5/] during the peak (prime time) viewing hours remains

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5/ The financial and economic realities are parallel: The success of most first-run programming is greatly dependent

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crucial to first-run syndication because the programs successfully launched in the access period are the economic foundation for the development of all first-run programming. And, access to such an audience cannot be achieved by a newly-launched first-run series unless it has potential access to the dominant stations -- the network-owned and network-affiliated stations -- in all of the top 50 markets.

Hubbard and Channel 41, Inc., implicitly -- and CBS explicitly -- admit that modification of PTAR to permit off-network programming to be broadcast during primetime access will result in a "redistribution of off-network and first-run programming between affiliates and independent stations and between access scheduling and scheduling in other day parts." CBS Comments at 73. The unstated premise is that "redistribution" will entail some movement of first-run syndicated programming from network affiliates to independent stations and some corresponding movement of off-network programming from independent stations to network affiliates.

The premise is probably correct. It is precisely the reason why modification of PTAR to permit off-network programming to be aired in the access period would be tantamount to repeal. It is also precisely the reason why the

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5/ upon its ability to attract national advertising; and, as a general rule, these advertisers require that such programming be accessible by at least 70 percent of U.S. television households.

marketplace, of itself, will not provide the kind of access to audience that first-run syndicated programming needs if it is to become established and grow.

The "redistribution" referred to above would mean that first-run syndicated programming targeted for prime time access would be heavily, if not wholly, dependent upon independent stations (including stations affiliated with the so-called emerging networks) for access to audience. The fact that such first-run programming may successfully compete against off-network programming in markets below the top 50 or in other dayparts is irrelevant. The data compiled by OPP confirms that independent stations in the top 50 markets simply cannot supply access to audience during the "crucial" prime time hour of the size requisite to provide a reasonable likelihood of success of first-run syndicated programming. OPP Paper at 4019-20; Amendment to Part 73 of the Commission's Rules, 23 FCC 2d at 394. "Redistribution" would, in fact, diminish the ability of producers and syndicators of first-run programming to gain access to the audiences during the crucial hours upon which the health of the first-run programming industry indispensably depends.

Accordingly, the changes in the television marketplace that have occurred in the past 15 or 20 years provide absolutely no support for the proposition that the off-network restriction of PTAR serves no purpose in the current marketplace. Neither the economic infrastructure of first-run programming nor the relative strength of network-owned and -affiliated stations in their respective markets has changed.

Second. The existence of alternative multi-channel distribution systems equally fails to support the proposition that PTAR has outlived its usefulness to the public interest. The ratings of all of the cable television networks combined do not equal that of any one of the three television networks affected by PTAR. OPP Paper, 6 FCC Rcd at 4019. It is therefore not surprising that there has been virtually no first-run programming sold by syndicators to cable systems in this country.[6/] Moreover, over-the-air stations in general, and network-owned and -affiliated stations in particular, remain the most widely viewed of all services carried on cable, and Congress and this Commission have taken steps to protect over-the-air broadcasting in the multi-channel environment. See, e.g., 47 USC § 325(b). Lastly, even if the economics of first-run syndicated programming and cable networks were remotely comparable (and they are not), the fact is that, for technological and regulatory reasons, new cable services are experiencing serious difficulties in securing access to audience. See Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266 (FCC 94-38 released March 30, 1994). In any case,

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6/ The fact that some off-network programming has been sold to cable networks (see, e.g., "Cable Networks Broaden Focus", MultiChannel News p. 9 (June 28, 1993)) serves only to prove that, because of off-net programming carries a built-in audience demand, considerations of access to audience are less crucial than is the case with first run programming.

the notion that there is a single, seamless marketplace for video programming is simply without foundation in fact.

The available evidence shows unequivocally that the need for PTAR remains unabated by changes in the video marketplace. If necessary, we are prepared to show that the "redistribution", referred to above would yield a net loss in consumer welfare, and that outlets suitable for off-network programming do not afford audience reach sufficient to sustain a vibrant first-run syndication industry. In all events, the Commission should not proceed with any rulemaking looking toward modification of the rule until it has examined, far more closely than the available evidence permits, the economic infrastructure of that industry, which continues to be dependent upon PTAR.

The Claim That PTAR Violates The First Amendment Is Profoundly Misguided.

Unlike Hubbard and Channel 41, First Media does not address the public interest values underlying PTAR at all, contending that these considerations are irrelevant because the rule is unconstitutional on its face. First Media claims that, as a result of the Commission's decision repealing a part of the Fairness Doctrine, "the concept of scarcity is no longer relevant" and, therefore, "can no longer support content based regulations." Reply to Comments on Petition for Declaratory Ruling of First Media Corporation at 6, 12. (Emphasis in the original). From first to last, the argument is hopelessly flawed.[7/]

First Media profoundly misunderstands the concept of "scarcity" which underlies Red Lion and its progeny. See Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S., 367 (1969); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). These decisions make it absolutely clear that the "scarcity" which permits more restrictive regulation of the broadcast medium than would be tolerated under the First Amendment in other media is not to be measured by the number (or type) of outlets that are available in the marketplace, as First Media seems to believe. It is, rather, "because of the scarcity of [electromagnetic] frequencies" that the Government is "permitted to put restraints on licensees" of television stations. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390 (1969): only a finite number of television stations can be permitted to operate in any geographic area; it is this law of physics that underlies the "scarcity" rationale of Red Lion.

It may be true, as First Media suggests, that the Supreme Court was unaware of the incipient proliferation of video distribution systems when it decided Red Lion in 1969. But,

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7/ As a technical matter, the first Media Petition is also premature. The courts have made it clear that the Commission is to address constitutional issues only after a determination of the public interest considerations of a challenged rule or policy. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). However, because we believe that PTAR must be found to serve the public interest, we address First Media's arguments on the merits.

surely, the Court was not unaware of the changes that had occurred in the marketplace by the time it decided Metro Broadcasting, Inc. v. FCC in 1991. Nonetheless, the Court specifically adhered to the frequency scarcity rationale articulated in Red Lion in reaching its conclusion that the Commission's minority ownership and distress sale policies are constitutional under the First Amendment.[8/] In constitutional terms, "scarcity" has a defined meaning which has not changed. The two decisions that upheld the constitutionality of PTAR remain good law: Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971) and NAITPD v. FCC, 516 F.2d 526 (2d Cir. 1975).

Even if the Commission were to decide -- for the first time[9/] -- that the constitutional principles of Red Lion and

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8/ First Media attempts to distinguish Metro Broadcasting by asserting that the rules at issue there were upheld as appropriate instruments for implementation of the equal protection clause of the Fourteenth Amendment. There is nothing in the decision that we can find that supports this analysis; and, in any event, such an explanation does not alter the fact that the Supreme Court not only relied upon, but directly quoted from, Red Lion in reaching the conclusion that the minority ownership and distress sale rules are constitutional. Metro Broadcasting, 494 U.S. at 566-67.

9/ First Media also seriously misreads the Commission's decision in Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988). That decision did not (and probably could not as a matter of law) entail a finding that the scarcity rationale of Red Lion is "obsolete." Rather, the Commission found that the Fairness Doctrine (other than the Personal Attack Rules) in practice inhibited debate on issues of public import, therefore

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its progeny are "obsolete," it would nonetheless be compelled, on the issue of constitutionality, to uphold PTAR as a constitutional exercise of its regulatory authority.

It may be true that First Amendment considerations are implicated whenever the Government undertakes to regulate a medium of communications. But, not all regulation of the broadcast medium is content-based, despite First Media's claim to the contrary. PTAR, for one, is not "content-based." Unlike the Fairness Doctrine, PTAR does not dictate to television stations what to say or what to talk about. Compare Buckley v. Valeo, 424 U.S. 1, 20 (1976), with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Rather, PTAR is premised upon market-based diversity considerations. To the extent that PTAR affects speech at all, it does so only by identifying categories of "speakers" -- producers of non-network-owned or -controlled programming, including stations themselves -- to be protected. Cf., Associated Press

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9/ failed to promote diversity and, because the public interest values and constitutional considerations were "intertwined," was probably also unconstitutional. See Syracuse Peace Council v. FCC, 867 F.2d at 658. Whether the Commission was correct or incorrect in its public interest assessment and in its assessment that the public interest and the First Amendment values in that case were "intertwined" is beside the point. The Commission simply did not find the scarcity rationale to be "obsolete" nor did it find the Fairness Doctrine to be unconstitutional on its face.

v. US, 326 US 1, 20 (1945). The rule may be speaker-partial, but it is content-neutral.[10/]

As a result, even if the Red Lion test is deemed "obsolete," PTAR must be upheld on constitutional grounds if it is found to promote a significant governmental interest unrelated to the suppression of speech and does not burden substantially more speech than is necessary to vindicate that interest. United States v. O'Brien, 391 U.S. 367 (1968); Ward v. Rock Against Racism, 491 U.S. 781 (1989).

PTAR plainly satisfies the O'Brien test. It certainly cannot be contended at this late date that the government does not have a significant, indeed compelling, interest in promoting diversity in the electronic media. That is precisely what PTAR is intended to do and does: "as a practical matter", the rule is designed to "open up the media to those whom the First Amendment primarily protects--the general public." Mount Mansfield Television v. FCC, 442 F.2d at 478. Its purpose is the advancement, not the suppression, of speech. See Associated Press v. U.S., 326 U.S. 1 (1945).

It equally cannot be contended that the rule is broader than absolutely essential to the furtherance of the "fundamental precepts" of the First Amendment. Mount Mansfield Television v. FCC, 442 F.2d at 478. The rule "opens up" at

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10/ The exceptions to the basic rule are content-based. But, First Media does not, and surely could not be heard to, complain that the rule as a whole is content-based because it allows certain programs controlled by a network to be aired during the otherwise protected time period.

most one hour of the four hours of the peak, prime-time viewing period, for speakers to provide programming not owned or controlled by the networks; and it does so only in the top 50 markets, to which access is indispensable to the attainment of the interest at stake. Moreover, the rule does not, either by design or in practice, foreclose the networks and syndicators of off-network programming from meaningful, alternative access to the same markets during the same time period. In terms of both hours and markets affected, PTAR intrudes no more deeply on the--principally economic, rather than speech--interests of the networks than is essential to assure that "truly independent sources of prime time programming" have access to the American public. Because PTAR fully satisfies the O'Brien tests applicable to content-neutral regulation of speech, it is constitutional.

We are confident that any further exploration of the public interest values of PTAR, in response to the petitions of Hubbard and Channel 41, Inc., will lead the Commission to unequivocally conclude that the rule continues to serve the public interest. Ordinarily, such a finding might oblige the Commission to consider constitutional concerns. See Syracuse Peace Council v. FCC, 867 F.2d at 659. But the constitutional arguments advanced by First Media are so utterly without merit that they should be ruled out of any further proceedings with respect to PTAR. First Media's petition for declaratory ruling should be dismissed.

<u>Conclusion</u>

Neither public interest nor constitutional considerations warrant any reexamination of PTAR. At the very least, the contributions that PTAR has made to program diversity and choice over the past two decades, and the plain continuing need for the rule, suggest that the Commission proceed with the utmost of caution and without indulging in any assumptions or tentative conclusions. If further inquiry into this matter is to be conducted, it should, therefore, take the form of a Notice of Inquiry in which constitutional considerations are ruled out and in which the unsettling effects of further proceedings upon producers and distributors of first-run syndicated programming are kept to a minimum.

Respectfully submitted,

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